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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Stephanie Mueller,

No. CV-20-00045-TUC-JCH

Plaintiff,

ORDER

V.

Car Wash Partners Incorporated,

Defendant.

Plaintiff Stephanie Mueller (“Mueller”) alleges that Defendant Car Wash Partners Incorporated (“CWP”) terminated her employment because she was pregnant, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended by the Pregnancy Discrimination Act. (Doc. 1.) Pending before the Court is CWP’s Motion for Summary Judgment (“Motion”) (Doc. 51), which is fully briefed (Docs. 57, 60). For the following reasons, the Court will deny the Motion.¹

I. Facts²

CWP is a national car wash company headquartered in Tucson, Arizona. (Doc. 52 at 1 ¶ 2; Doc. 58 at 11 ¶ 2.) CWP's written policies prohibit unlawful discrimination of any kind, including discrimination on the basis of gender or pregnancy. (Doc. 52 at 2 ¶ 7; Doc. 58 at 11 ¶ 7; *see also* Doc. 52-6 at 2.) CWP distributes its employment policies, including its anti-discrimination policy, to all its employees. (Doc. 52 at 2-3 ¶ 8; Doc. 58

¹ The Court finds that the Motion is suitable for resolution without oral argument pursuant to LRCiv 7.2(f).

² Unless otherwise noted, the facts recited herein are undisputed. All record citations refer to the page numbers generated by the Court's electronic filing system.

1 at 11 ¶ 8.)

2 In mid-2017, CWP’s Chief Executive Officer John Lai (“Lai”) reached out to
 3 Mueller to discuss employment opportunities with the company. (Doc. 52 at 3 ¶ 10; Doc.
 4 58 at 1-2 ¶ 1; Doc. 58 at 11 ¶ 10.) Over the next several months, Lai, Vice President of
 5 Operations Services Mayra Chimienti (“Chimienti”), and now-Vice President of Planning
 6 and Development Sarah Ross (“Ross”) met with Mueller to get to know her and discuss
 7 CWP. (Doc. 52 at 3-4 ¶ 11; Doc. 58 at 2 ¶ 2; Doc. 58 at 11 ¶ 11; *see also* Doc. 52-2 at 2 ¶
 8 3; Doc. 52-9 at 2 ¶ 3.) The parties dispute whether Chimienti asked, during one of their
 9 pre-employment conversations, if Mueller planned to have another baby. (Doc. 58 at 2 ¶
 10 3; Doc. 52-4 at 21; *see also* Doc. 52-10 at 13-14; Doc. 58-1 at 6; Doc. 58-3 at 9.)

11 CWP’s leadership determined that Mueller would be a good addition to CWP’s
 12 corporate office given her experience and the positive attitude and enthusiastic demeanor
 13 she displayed during the pre-employment interviews. (Doc. 52 at 5 ¶ 18; Doc. 58 at 2 ¶¶
 14 2, 4; Doc. 58 at 12 ¶ 18.) On November 6, 2017, CWP hired Mueller as an Integration
 15 Services Support Specialist under the supervision of Ross. (Doc. 52 at 5 ¶ 18; Doc. 58 at
 16 2 ¶ 5; Doc. 58 at 12 ¶ 18.) Mueller received a copy of CWP’s employment policies in
 17 February 2018. (Doc. 52 at 2-3 ¶ 8; Doc. 58 at 11 ¶ 8.) At all times, Mueller’s employment
 18 with CWP was at-will. (Doc. 52 at 5 ¶ 19; Doc. 58 at 12 ¶ 19.)

19 As an Integration Services Support Specialist, Mueller was responsible for
 20 supporting the integration of newly acquired car washes. (Doc. 52 at 5-6 ¶¶ 20-21; Doc.
 21 58 at 12 ¶¶ 20-21.) Soon after Mueller joined CWP, the company’s acquisition of other
 22 companies slowed due to market reasons and Mueller’s integration-related work was less
 23 than expected. (Doc. 52 at 6 ¶ 22; Doc. 58 at 2-3 ¶ 8; Doc. 58 at 12 ¶ 22.) There were no
 24 new acquisitions during the first nine months of Mueller’s employment with CWP and
 25 Mueller worked on projects from other departments instead of the integration-related work
 26 for which she had been hired. (Doc. 52 at 6 ¶ 22; Doc. 58 at 2-3 ¶ 8; Doc. 58 at 12 ¶ 22.)
 27 The parties dispute whether Mueller was unhappy with her job, but it is undisputed that she
 28 felt underutilized and told Ross and Lai that she wanted to do more for CWP. (Doc. 52 at

1 6-7 ¶¶ 23-26; Doc. 58 at 12 ¶¶ 23-26; *see also* Doc. 52-9 at 3-4; Doc. 52-10 at 23, 25-26;
 2 Doc. 58-1 at 8-10.)

3 In August 2018, Chimienti took Mueller to lunch to discuss transferring her to an
 4 Operations Services Specialist position in which Mueller would support regional managers
 5 throughout the country and write a weekly newsletter, “the Ops Connect,” for distribution
 6 to field leadership. (Doc. 52 at 7-8 ¶¶ 28-30; Doc. 58 at 13 ¶ 28-30.) Chimienti asked
 7 Mueller to think carefully before taking the position because Chimienti did not want
 8 Mueller to be unhappy on the Operations Services team. (Doc. 52 at 9 ¶ 32; Doc. 58 at 13
 9 ¶ 32.)

10 Mueller accepted the Operations Services Specialist position on or about August 10,
 11 2018, under the supervision of Chimienti, and worked in that position until CWP
 12 terminated her employment on February 6, 2019, about six months later. (Doc. 52 at 9 ¶¶
 13 35-36; Doc. 58 at 3 ¶ 11; Doc. 58 at 13 ¶¶ 35-36.) In December 2018, CWP hired Patricia
 14 Bohardt (“Bohardt”)³ as a second Operations Services Specialist and as Mueller’s
 15 counterpart. (Doc. 52 at 14 ¶¶ 49, 51; Doc. 58 at 17-18 ¶¶ 49, 51.) Together, Mueller and
 16 Bohardt shared the duties and responsibilities of supporting CWP’s six national divisions.
 17 (Doc. 52 at 14 ¶¶ 49, 51; Doc. 58 at 17-18 ¶¶ 49, 51.)

18 The parties dispute whether there were problems with Mueller’s job performance,
 19 engagement, and demeanor. (Doc. 52 at 10-17, 21 ¶¶ 38-48, 50, 52-59, 83; Doc. 58 at 3 ¶
 20 12; Doc. 58 at 13-20, 23-24 ¶¶ 38-48, 50, 52-59, 83.) The parties also dispute whether
 21 Mueller complained about her new position to her coworkers and whether her alleged
 22 negativity impacted the morale of her coworkers, including Bohardt. (Doc. 52 at 10-17 ¶¶
 23 38, 42, 44-46, 50, 52-56, 59; Doc. 58 at 13-20 ¶¶ 38, 42, 44-46, 50, 52-56, 59.)

24 Mueller learned she was pregnant in November 2018 but did not tell anyone at CWP
 25 until approximately January 2019; at that time, she began to tell some of her coworkers,
 26 including Bohardt. (Doc. 52 at 17-18 ¶¶ 62-64, 66; Doc. 58 at 3 ¶¶ 14-15; Doc. 58 at 20-
 27 21 ¶¶ 62-64, 66.) Two members of CWP’s human resources team, Michelle Beagle

28 ³ Bohardt is referred to as “Trish” (Doc. 52 at 13 ¶ 46) and “Patrishia” (Doc. 52 at 12 ¶ 43; Doc. 58 at 10 ¶ 63).

1 (“Beagle”) and Linda Filep (“Filep”), spoke to Mueller about her pregnancy either in late
 2 January or early February 2019. (Doc. 52 at 19-20 ¶¶ 75-77; Doc. 58 at 4 ¶ 23; Doc. 58 at
 3 23 ¶¶ 75-77.)⁴ In late January 2019, Chimienti asked Mueller if she was pregnant. (Doc.
 4 52 at 18 ¶ 67; Doc. 58 at 4 ¶¶ 19-21; Doc. 58 at 21 ¶ 67.) The parties dispute the tone and
 5 content of the resulting conversation. (Doc. 52 at 18 ¶ 67; Doc. 58 at 4 ¶ 19-20; Doc. 58
 6 at 21 ¶ 67.) Mueller contends that Chimienti avoided her after learning she was pregnant.
 7 (Doc. 58 at 4, 21 ¶¶ 22, 67.)

8 On February 6, 2019—approximately two weeks after Chimienti asked Mueller if
 9 she was pregnant—Chimienti informed Vice-President of Human Resources Anna Zappia
 10 (“Zappia”) that she had decided to terminate Mueller’s employment. (Doc. 52 at 16-17 ¶¶
 11 59-61; Doc. 58 at 20 ¶¶ 59-61.) On the same day, Chimienti and Zappia notified Mueller
 12 of her termination. (Doc. 52 at 17 ¶ 60; Doc. 58 at 5 ¶ 31.) The parties dispute whether
 13 Chimienti fired Mueller because of her pregnancy or due to concerns regarding the effect
 14 of her purportedly negative demeanor on the work environment of her coworkers. (Doc.
 15 52 at 16-19 ¶¶ 59-61, 68-69; Doc. 58 at 4-11, 20-22 ¶¶ 18-68, 59-61, 68-69.) The parties
 16 also dispute whether CWP supports pregnant employees. (Doc. 52 at 19 ¶¶ 71-74; Doc.
 17 58 at 22-23 ¶¶ 71-74.)

18 **II. Summary Judgment Standard**

19 A court must grant summary judgment “if the movant shows that there is no genuine
 20 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
 21 Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The
 22 movant bears the initial responsibility of presenting the basis for its motion and identifying
 23 those portions of the record, together with affidavits, if any, that it believes demonstrate
 24 the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the movant
 25 fails to carry its initial burden of production, the nonmovant need not produce anything.

26
 27 ⁴ Mueller does not dispute Defendants’ contention that Beagle and Filep spoke to her in late
 28 January 2019 about completing paperwork for her leave and expressed excitement for her. (Doc.
 52 at 19-20 ¶¶ 75-77; Doc. 58 at 23 ¶¶ 75-77.) However, Mueller separately contends that Beagle
 and Filep commented on her pregnancy on February 5, 2019 and questioned her derisively about
 it. (Doc. 58 at 4 ¶ 23.)

1 *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). But
 2 if the movant meets its initial responsibility, the burden shifts to the nonmovant to
 3 demonstrate the existence of a factual dispute and to show (1) that the fact in contention is
 4 material, i.e., a fact “that might affect the outcome of the suit under the governing law,”
 5 and (2) that the dispute is genuine, i.e., the evidence is such that a reasonable jury could
 6 return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50
 7 (1986); *see also Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).

8 At summary judgment, the judge’s function is not to weigh the evidence and
 9 determine the truth but to determine whether there is a genuine issue for trial. *Anderson*,
 10 477 U.S. at 249. In evaluating a motion for summary judgment, the court must “draw all
 11 reasonable inferences from the evidence” in favor of the non-movant. *O’Connor v. Boeing*
 12 *N. Am., Inc.*, 311 F.3d 1139, 1150 (9th Cir. 2002). If “the evidence yields conflicting
 13 inferences, summary judgment is improper, and the action must proceed to trial.” *Id.* “The
 14 court need consider only the cited materials, but it may consider other materials in the
 15 record.” Fed. R. Civ. P. 56(c)(3).

16 **III. Discussion**

17 **A. Title VII Discrimination – Applicable Law**

18 Under Title VII of the Civil Rights Act, as amended by the Pregnancy
 19 Discrimination Act, it is unlawful to discharge an individual because of the individual’s
 20 pregnancy. 42 U.S.C. §§ 2000e(k), 2000e-2(a)(1). Title VII pregnancy discrimination
 21 claims are analyzed under the three-step burden-shifting framework set forth in *McDonnell*
 22 *Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, the plaintiff
 23 carries an initial burden of establishing a prima facie case of discrimination. *Id.* at 802. If
 24 the plaintiff does so, a presumption of unlawful discrimination arises. *Texas Dep’t of Cnty.*
 25 *Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Once plaintiff establishes a prima facie case
 26 of discrimination, the burden shifts to the defendant to “articulate some legitimate,
 27 nondiscriminatory reason” for the adverse employment action. *McDonnell Douglas Corp.*,
 28 411 U.S. at 802; *Burdine*, 450 U.S. at 254. If the defendant does so, the burden shifts back

1 to the plaintiff to show that the defendant’s stated reason for the adverse employment action
 2 is a pretext for unlawful discrimination—a burden that merges with the plaintiff’s “ultimate
 3 burden of persuading the court that she has been the victim of intentional discrimination.”
 4 *Burdine*, 450 U.S. at 253, 256; *see also McDonnell Douglas*, 411 U.S. at 804.

5 **B. *Prima Facie Case of Pregnancy Discrimination***

6 To establish a prima facie case, a plaintiff “must offer evidence that gives rise to an
 7 inference of unlawful discrimination.” *Hawn v. Executive Jet Mgmt., Inc.*, 615 F.3d 1151,
 8 1156 (9th Cir. 2010) (internal quotation and alteration marks omitted). The plaintiff may
 9 do so by offering evidence that shows (1) she is a member of a protected class; (2) she was
 10 qualified for her position; (3) she suffered an adverse employment action; and (4) similarly
 11 situated employees outside her protected class were treated more favorably. *Aragon v.
 12 Republic Silver State Disposal Inc.*, 292 F.3d 654, 658 (9th Cir. 2002). Generally,
 13 “individuals are similarly situated when they have similar jobs and display similar
 14 conduct.” *Hawn*, 615 F.3d at 1157 (internal quotation marks omitted). “The burden of
 15 establishing a prima facie case of disparate treatment is not onerous.” *Burdine*, 450 U.S.
 16 at 253. At the summary judgment stage, the degree of proof required is minimal “and does
 17 not even need to rise to the level of a preponderance of the evidence.” *Aragon*, 292 F.3d
 18 at 659 (internal quotation marks omitted); *see also Miller v. Fairchild Indus., Inc.*, 797 F.2d
 19 727, 731 (9th Cir. 1986).

20 CWP does not dispute that Mueller has established the first and third prongs of the
 21 *McDonnell Douglas* framework: Mueller, as a pregnant woman, was a member of a
 22 protected class and suffered an adverse employment action when CWP terminated her
 23 employment. (Doc. 51 at 11.) However, CWP argues that Mueller cannot show that she
 24 was qualified for her position or that similarly situated employees were treated more
 25 favorably. (*Id.* at 11-13.) Specifically, CWP argues that Mueller failed to meet CWP’s
 26 expectations due to her negative attitude and performance issues, and that she cannot prove
 27 that she performed well enough to rule out the possibility that she was fired for inadequate
 28 performance. (*Id.* at 11-12.) CWP further argues that Mueller has not identified any non-

1 pregnant employees with similarly negative attitudes and engagement levels who were
 2 treated more favorably. (*Id.* at 12-13.) CWP contends that the only employee identified
 3 by Mueller's interrogatory responses, Nora Heston (*see Doc.* 52-17 at 7), is not similarly
 4 situated because she works on the human resources team and is upbeat and encouraging to
 5 her coworkers. (*Doc.* 51 at 13.) In response, Mueller argues that she performed her job
 6 satisfactorily and her similarly situated, non-pregnant counterpart, Bohardt, was not
 7 terminated. (*Doc.* 57 at 8-9.) In reply, CWP argues that Bohardt is not similarly situated
 8 because she did not have the same attitude and performance problems as Mueller. (*Doc.*
 9 60 at 6-7.)

10 Undisputed evidence shows that Mueller was qualified for her job in terms of
 11 education and experience. (*Doc.* 52-4 at 22, 26-27; *Doc.* 52-12 at 10; *Doc.* 58-3 at 10.)
 12 Furthermore, undisputed evidence shows that Mueller was, at the least, performing the
 13 baseline requirements for her position. (*Doc.* 52-4 at 21-22, 38, 40; *Doc.* 58-3 at 9-10;
 14 *Doc.* 58-4 at 9.) The record is devoid of any evidence of formal written evaluations,
 15 disciplinary notices, reprimands, or warnings documenting any problems with Mueller's
 16 job performance or attitude. (*See Doc.* 52-4 at 21, 23, 27; *Doc.* 58-3 at 9.) Nor is there
 17 any evidence that Chimienti or anyone else raised concerns about Mueller to the human
 18 resources department in the weeks leading up to Mueller's termination. (*See Doc.* 52-5 at
 19 8-9; *Doc.* 52-18 at 7.)⁵ It is undisputed that Mueller and Bohardt had the same job
 20 responsibilities. (*Doc.* 52-10 at 31; *Doc.* 52-12 at 6-10; *Doc.* 58-1 at 11.)

21 To support their position that Mueller was not qualified and not similarly situated
 22 to Bohardt, CWP relies upon declarations and deposition testimony indicating that Mueller
 23 displayed a negative attitude and failed to effectively communicate with the regional
 24 managers whom it was her job to support. (*See, e.g., Doc.* 52-2 at 3-8; *Doc.* 52-4 at 21-23,
 25 25-27, 31-42; *Doc.* 52-12 at 9-17; *Doc.* 52-15 at 2-3.) But Mueller testified at her

27 ⁵ Zappia contends that Chimienti raised concerns about Mueller in October 2018. (*Doc.* 52-5 at
 28 15-16; *see also Doc.* 52-2 at 6.) Specifically, Chimienti was concerned that Mueller made more
 money than the rest of the team but seemed unwilling to make herself available after business
 hours. (*Doc.* 52-5 at 15-16; *see also Doc.* 52-2 at 6.) Even if this were true it does not relate to the
 reasons CWP gives for ultimately terminating Plaintiff in February 2019. (*See Doc.* 51 at 13-14.)

1 deposition that she was happy with her job and that she communicated with the regional
2 managers based on their preferences of whether they wanted to be contacted via email,
3 phone, or text. (Doc. 58-1 at 8-10.) Both Chimienti and Bohardt testified in their
4 depositions about an incident on December 10, 2018, where Mueller failed to include an
5 attachment in her weekly “Ops Connect” email to field leadership (Doc. 52-4 at 41-42;
6 Doc. 52-12 at 18-19.) The incident is undisputed by Mueller. (Doc. 52-10 at 33-35.)
7 However, the oversight was easily remedied by sending out the attachment within a few
8 hours, this was a one-time occurrence, and there is no documentary evidence to support
9 that anyone at CWP considered the December incident a significant matter when it
10 occurred. (Doc. 52-10 at 33-34; Doc. 52-4 at 41-42.)

11 Ninth Circuit case law contains conflicting guidance regarding whether a plaintiff
12 must present evidence eliminating the possibility that she was fired for inadequate job
13 performance in order to establish a prima facie case of discrimination. In *Aragon*, the Ninth
14 Circuit found that such a requirement would “conflate the minimal inference needed to
15 establish a prima facie case with the specific, substantial showing [a plaintiff] must make
16 at the third stage of the *McDonnell Douglas* inquiry.” 292 F.3d at 659. However, in an
17 earlier case, *Sengupta v. Morrison-Knudsen Co.*, the Ninth Circuit cited out-of-circuit
18 authority for the proposition that a plaintiff must show, as one element of a prima facie
19 case of discriminatory discharge, that “he was doing his job well enough to rule out the
20 possibility that he was fired for inadequate job performance.” 804 F.2d 1072, 1075 (9th
21 Cir. 1986); *see also Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 672 (9th Cir. 1988)
22 (citing *Sengupta*). The analysis contained in *Aragon* is more detailed and is seemingly
23 more consistent with Supreme Court precedent, which establishes that a plaintiff’s burden
24 at the first stage of the *McDonnell Douglas* framework is “not onerous.” *Burdine*, 450 U.S.
25 at 253. But even if a plaintiff must meet the standard identified in *Sengupta*, Mueller has
26 met her burden of establishing a prima facie case for purposes of summary judgment
27 because she has identified evidence raising a genuine issue of material fact regarding
28

1 whether she suffered from job performance and attitude issues.⁶

2 **C. Legitimate, Non-Discriminatory Reason**

3 To meet its burden of proffering a legitimate, non-discriminatory reason for an
 4 adverse employment action, a defendant must “raise[] a genuine issue of fact as to whether
 5 it discriminated against the plaintiff” by presenting admissible evidence supporting a
 6 “legitimate, nondiscriminatory reason” for the adverse employment action. *Burdine*, 450
 7 U.S. at 254-55. The defendant “need not persuade the court that it was actually motivated
 8 by the proffered reasons.” *Id.* at 254.

9 CWP argues that it terminated Mueller’s employment because Chimienti was
 10 concerned that Mueller’s negative attitude would impact the morale and productivity of
 11 her team members. (Doc. 51 at 13-14; *see also* Doc. 51-2 at 6-8.)

12 An employer’s concern that an employee’s negative attitude would lower the morale
 13 and productivity of other employees is a legitimate, non-discriminatory reason for
 14 terminating an at-will employee. *See Stegall v. Citadell Broadcasting Co.*, 350 F.3d 1061,
 15 1068 (9th Cir. 2003) (holding that an employee’s negative attitude about her job is a
 16 legitimate, nondiscriminatory reason for termination). CWP has offered evidence
 17 supporting its position that Mueller was fired because Chimienti was concerned her
 18 negativity was impacting her team members. (*See, e.g.*, Doc. 52-2 at 3-8; Doc. 52-4 at 21-
 19 23, 25-27, 31-42; Doc. 52-12 at 9-17; Doc. 52-15 at 2-3; Doc. 52-13 at 2.)⁷ Specifically,

20 ⁶ The parties’ briefs focus on the above-discussed four-factor test for establishing a prima facie
 21 case. (*See* Doc. 51 at 11-13; Doc. 57 at 7-9.) The Court notes, however, that “the elements and
 22 contours of a prima facie case” may vary depending on the unique facts of a case, and a plaintiff
 23 may establish “an inference of discrimination in whatever manner is appropriate in the particular
 24 circumstances,” *Hawn*, 615 F.3d at 1156, including by presenting “more direct evidence of
 25 discriminatory intent,” *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998). As
 26 discussed below, Mueller has presented at least some direct evidence of discriminatory motive,
 27 and the timing of her termination may also give rise to an inference of discrimination.

28 ⁷ CWP supports its position that Mueller displayed a negative attitude in part through evidence
 29 that Mueller complained regularly to her co-workers about her job. (Doc. 52-4 at 31-33; Doc. 52-
 30 12 at 11-16.) The Court notes that at least some of those complaints apparently related to concerns
 31 regarding unlawful employment practices. For example, Mueller expressed concerns to Bohardt
 32 that CWP would discriminate against her if she revealed she was pregnant. (Doc. 52-12 at 15;
 33 Doc. 52-14 at 3.) Mueller also expressed concerns regarding CWP’s firing of one of her co-
 34 workers. (Doc. 52-12 at 13-14.) It is unlawful for an employer to fire an employee for expressing
 35 a reasonable belief that the employer is engaged in unlawful employment practices. *See* 42 U.S.C.
 36 § 2000e-3(a); *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983). Ultimately,
 37 there is no evidence that Bohardt told Chimienti about the concerns that Mueller expressed to her

1 Chimienti testified that she received numerous complaints about Mueller's negative
 2 demeanor, often from Mueller's coworkers who spoke to Chimienti in confidence. In one
 3 example, Courtney Steffensen raised concerns about Mueller with Chimienti. (Doc. 52-4
 4 at 43-44.) Steffensen supervised Monica Hernandez, an employee who had transferred to
 5 the Tucson office in early 2019. (*Id.*) Steffensen, concerned that Mueller's negativity would
 6 impact Hernandez's performance, asked Chimienti if Mueller could be seated away from
 7 Hernandez. (*Id.*) In a second example, Leslie Thesing informed Chimienti that Mueller
 8 had made disparaging comments to and about Bohardt—specifically that Bohardt was
 9 "overeager and annoying." (Doc. 52-15 at 3.) CWP also proffers a November 5, 2018, text
 10 message between Chimienti, Lai, and CWP Vice-President Joe Matheny, where Lai
 11 seemingly observes that Mueller does not embody the company's spirit or culture. (Doc.
 12 52-13 at 2.)

13 At this juncture, CWP's proffered reason—Mueller's alleged negative attitude—is
 14 sufficient to satisfy CWP's burden of providing a legitimate, non-discriminatory reason for
 15 Mueller's termination.

16 **D. Pretext**

17 If the defendant articulates a legitimate nondiscriminatory reason for the adverse
 18 employment action, the burden shifts back to the plaintiff to show that the stated reason
 19 was in fact pretextual. *McDonnell Douglas*, 411 U.S. at 804. A plaintiff may demonstrate
 20 pretext in two ways: (1) directly, by showing that unlawful discrimination more likely than
 21 not motivated the employer; or (2) indirectly, by showing that the employer's proffered
 22 explanation is unworthy of credence because it is internally inconsistent or otherwise not
 23 believable. *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1112–13 (9th Cir.2011).
 24 Where evidence of pretext is circumstantial, rather than direct, the plaintiff must produce
 25 "specific" and "substantial" facts to create a triable issue of pretext. *Id.* at 1113 (internal
 26 citations omitted). Where a plaintiff succeeds in raising a genuine issue of material fact
 27 regarding the authenticity of the employer's stated motive, summary judgment is

28 (Doc. 58-5 at 12-13), and thus Mueller's statements to Bohardt concerning CWP's employment
 practices apparently did not play a role in Chimienti's decision to fire Mueller.

1 inappropriate because it is for the trier of fact to decide which story is to be believed.
 2 *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir.1993).

3 Mueller argues that the record shows CWP's proffered explanation lacks credibility,
 4 and a discriminatory motive more than likely motivated CWP. (Doc. 57 at 11-13.)
 5 Moreover, Mueller argues that an inference of discrimination arises due to the temporal
 6 proximity between when Chimienti confirmed Mueller was pregnant and when Chimienti
 7 made the unilateral decision to terminate her. (*Id.* at 11-12.) CWP contends that there is
 8 no direct or circumstantial evidence that its proffered reason for Mueller's termination is
 9 pretextual. (Doc. 51 at 14-17.)

10 The Court agrees that Mueller has presented at least some direct evidence of
 11 pregnancy discrimination. Mueller testified at her deposition that, before she was hired,
 12 Chimienti asked her if she was planning to have any more children. (Doc. 52-10 at 13-14;
 13 Doc. 58-1 at 6.) Mueller further testified that when Chimienti asked her if she was
 14 pregnant, she did so in a derogatory tone and asked if she was hiding the pregnancy,
 15 whether she had planned it, and how much time she was planning to take off before
 16 abruptly ending the conversation and thereafter avoiding Mueller until her termination.
 17 (Doc. 52-10 at 48-49; Doc. 58-2 at 6-9.) Chimienti testified that she never asked Mueller
 18 if she planned to have more children and that she excitedly congratulated Mueller about
 19 her pregnancy. (Doc. 52-4 at 21, 28-29; Doc. 58-3 at 9, 13; Doc. 58-4 at 1.)⁸ The trier of
 20 fact will need to resolve these material disputes of fact to determine whether Chimienti's
 21 conduct constitutes direct evidence of pregnancy discrimination.

22 Furthermore, there are material factual issues concerning whether circumstantial
 23 evidence raises an inference of discriminatory motive. Chimienti decided to terminate
 24 Mueller approximately two weeks after she confirmed that Mueller was pregnant. (Doc.
 25 52-4 at 28, 37, 42-44; Doc. 52-10 at 50-51; Doc. 58-2 at 6, 11-12; Doc. 58-4 at 1, 6, 11-
 26 14.) A reasonable fact-finder could determine that this close temporal proximity raises an

27
 28 ⁸ In addition, Mueller testified that Filep and Beagle asked her about the pregnancy in a derogatory
 manner, whereas Filep and Beagle testified that they were excited for Mueller. (Doc. 58-2 at 10;
 Doc. 52-18 at 7-8; Doc. 52-19 at 7-8.)

1 inference of discriminatory motive. *See Asmo v. Keane, Inc.*, 471 F.3d 588, 593 (6th Cir.
 2 2006) (temporal proximity between employer learning of pregnancy and termination of
 3 employment can support inference of nexus between pregnancy and termination); *Linder*
 4 *v. Pacific Dataware, Inc.*, 142 F.3d 444, at *1 (9th Cir. Apr. 22, 1998) (mem.) (where
 5 employee informed her employer of her pregnancy six hours before being fired, temporal
 6 proximity supported an inference of discrimination); *Medina v. Multaler, Inc.*, 547 F. Supp.
 7 2d 1099, 1129 (C.D. Cal. 2007) (temporal proximity between date employer learned of
 8 pregnancy and adverse employment actions suggested discriminatory motive); *cf. Flores*
 9 *v. City of Westminster*, 873 F.3d 739, 749 (9th Cir. 2017) (temporal proximity can support
 10 inference of causal connection between protected activity and adverse employment action
 11 for purposes of retaliation claim).

12 Moreover, there are material factual disputes concerning whether CWP’s proffered
 13 reason for Mueller’s termination is credible. As discussed above, CWP submitted
 14 declarations and deposition testimony supporting its position that Mueller displayed a
 15 negative attitude and that her negativity was affecting her team members. (*See, e.g.*, Doc.
 16 52-2 at 3-8; Doc. 52-4 at 21-23, 25-27, 31-42; Doc. 52-12 at 9-17; Doc. 52-15 at 2-3.)
 17 However, besides Chimienti, there are only two instances where the complaints about
 18 Mueller’s negativity are corroborated directly by witness testimony or declaration. In the
 19 first instance, sometime in January 2019,⁹ Leslie Thesing approached Chimienti regarding
 20 disparaging comments Mueller made about and to Bohardt. (Doc. 52-4 at 31-32; Doc. 52-
 21 15 at 3.) However, Thesing’s complaint arose from a conversation she overheard. (Doc.
 22 52-4 at 31-32; Doc. 52-15 at 3.) Thesing then relayed information to Chimienti without
 23 clarification or discussion with Mueller. (Doc. 52-4 at 31-32; Doc. 52-15 at 3.) Neither
 24 Thesing nor Chimienti approached Mueller or the other participants about the overheard
 25 remarks. (Doc. 52-4 at 32-33; Doc. 52-15 at 3.) In the second instance, Bohardt described
 26 Mueller’s ongoing negativity while acknowledging that she served as Mueller’s confidant.
 27 (Doc. 52-15 at 9-17.) Bohardt admits that she never told Chimienti or Zappia about the

28 ⁹ There is no listed date. Chimienti’s Deposition states “It was sometime in January [2019].” (*See* Doc. 52-4 at 32.) Leslie’s declaration, (*See* Doc. 52-15 at 3), likewise does not list a date.

1 criticisms Mueller shared with her until after Mueller's termination. (Doc. 58-5 at 12-13.)

2 The remaining complaints about Mueller's alleged negativity or its impact on the
 3 team is evidenced through Chimienti's self-serving testimony including: (1) where
 4 Courtney Steffensen requested that Mueller be seated away from her team member (Doc.
 5 52-4 at 33); (2) where CWP's CEO John Lai observed that Mueller may not be a good fit
 6 (*Id.* at 34-35; Doc. 52-13 at 2); and (3) where Joe Matheny told Chimienti that Mueller
 7 looked miserable half the time (Doc. 52-4 at 36-37). Each of these instances is based on
 8 Chimienti's account of what other CWP employees told or texted her. CWP does not offer
 9 any affidavits or depositions directly from Courtney Steffensen, John Lai, or Joe Matheny.
 10 (*See* Doc. 52-1 at 1-2.)

11 Lastly, Mueller contradicted the allegations of negativity, (*see* Doc. 58-1 at 8-10),
 12 and so did human resources employee Jennifer Forster, who testified that Mueller smiled
 13 whenever she saw her and never displayed a negative demeanor in her presence (Doc. 58-
 14 7 at 11-12). Furthermore, Chimienti testified at her deposition that Mueller's negativity
 15 "hadn't even reached the impact for [her] team yet." (Doc. 54-4 at 37.) And the evidence
 16 indicates that when Chimienti fired Mueller, she told Meuller that she was a nice person
 17 and that people liked her—comments that seem to contradict CWP's proffered reason for
 18 the termination. (Doc. 52-4 at 43; Doc. 52-10 at 51; Doc. 58-2 at 12.) Aside from text
 19 messages between Lai, Matheny, and Chimienti sent on November 5, 2018—concerning
 20 Mueller not embodying the spirit of CWP (Doc. 52-13 at 2)—there is no written evidence
 21 documenting any concerns regarding Mueller's job performance, attitude, or level of
 22 engagement. In order to determine whether CWP terminated Mueller because of her
 23 purported negativity or because of her pregnancy, the fact-finder will need to weigh the
 24 credibility of conflicting witness testimony at trial.

25 All of these considerations, taken together, are sufficient to carry Mueller's burden
 26 to produce "specific" and "substantial" facts to create a triable issue of pretext. As such,
 27 summary judgment is inappropriate.

28 ...

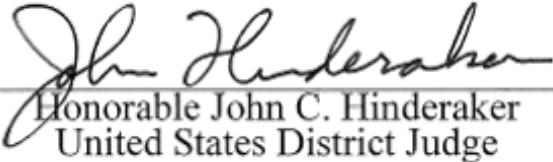
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2 **IV. Order**

3 Accordingly,

4 **IT IS ORDERED DENYING** Defendant CWP's Motion for Summary Judgment
5 (Doc. 51).

6 **IT IS FURTHER ORDERED** that the parties shall file their Joint Proposed Pretrial
7 Order within 30 days from the date of this order.

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9 Dated this 17th day of September, 2021.

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11 
12 Honorable John C. Hinderaker
13 United States District Judge

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